
IN THE MISSOURI SUPREME COURT

Appeal No. SC93195

City of Kansas City, Missouri,
Plaintiff/Respondent,

vs.

Karen Chastain, Et Al.
Defendants/Appellants.

APPEAL FROM THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
CASE NO. 1116-CV29139

AMICUS CURIAE BRIEF

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JURISDICTIONAL STATEMENT

Amici Curiae adopt the Jurisdictional Statement of Defendants-Appellants. This Court has jurisdiction pursuant to Article V, Section 10 of the Missouri Constitution.

STATEMENT OF FACTS

Amici Curiae adopt the statement of facts set forth by the Defendants-Appellants, Karen Chastain, et al., in their brief.

ARGUMENT

POINT RELIED ON

THE TRIAL COURT ERRED IN ITS JUDGMENT AND DECREE BY FINDING THAT ORDINANCE NO. 110607 SUBMITTED BY THE DEFENDANTS/APPELLANTS TO PLAINTIFFS/RESPONDENTS WAS FACIALLY INVALID BECAUSE EVIDENCE OUTSIDE THE FACE OF ORDINANCE NO. 110607 WAS USED TO DETERMINE THAT THE PETITION VIOLATED ARTICLE III, SECTION 51, OF THE MISSOURI CONSTITUTION BECAUSE IT DID NOT FULLY FUND THE PROJECTS WITHOUT APPROPRIATIONS, AND BY FAILING TO DETERMINE THAT THE ORDINANCE WAS FACIALLY INVALID UNDER ALL POSSIBLE CIRCUMSTANCES.

Barrett v. Claycomb, 705 F.3d 315 (8th Cir. 2013)

Barrett v. Claycomb, 2013 WL 1397822 (W.D. Mo. 2013)

Brown v. Carnahan, 370 S.W.3d 637 (Mo. banc 2012)

Burnell v. City of Morgantown, 210 W.Va. 506 (W. Va. 2001)

James D. Gordon III & David B. Magleby,

Pre-Election Judicial Review of Initiatives and Referendums,

64 Notre Dame L. Rev. 298, 312 (1989)

ARGUMENT

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STANDARD OF REVIEW

The Initiative Petition (PlfExhibit 104, Ordinance No. 110607, hereinafter referred to as "Ordinance No. 110607") submitted by the Plaintiffs/Appellants in this case complied with all of the procedural prerequisites in the Kansas City Charter for submission to the voters; therefore, the test to determine the validity of the proposed ordinance in the Initiative Petition is whether or not it is facially invalid. *See Knight v. Carnahan*, 282 S.W.3d 9, 21-22 (Mo. App. W.D. 2009). The courts do not review a proposed measure prior to its passage except where the defect is so obvious as to be a matter of form. *Id.* Other than reviewing the language of the proposed Initiative Ordinance there are no facts to be determined, just conclusions of law based on the language within the four corners of the proposed Initiative Ordinance; therefore the question before this Court is a question

of law. *See Brown v. Carnahan*, 370 S.W.3d 637, 653 (Mo. banc 2012). The standard of review for questions of law is de novo. *Id.*

DISCUSSION

THE TRIAL COURT ERRED IN ITS JUDGMENT AND DECREE BY FINDING THAT ORDINANCE NO. 110607 SUBMITTED BY THE DEFENDANTS/APPELLANTS TO PLAINTIFFS/RESPONDENTS WAS FACIALLY INVALID BECAUSE EVIDENCE OUTSIDE THE FACE OF ORDINANCE NO. 110607 WAS USED TO DETERMINE THAT THE PETITION VIOLATED ARTICLE III, SECTION 51, OF THE MISSOURI CONSTITUTION BECAUSE IT DID NOT FULLY FUND THE PROJECTS WITHOUT APPROPRIATIONS, AND BY FAILING TO DETERMINE THAT THE ORDINANCE WAS FACIALLY INVALID UNDER ALL POSSIBLE CIRCUMSTANCES.

A. Pre-election review of the constitutional validity of a proposed initiative is limited to a facial challenge to validity in which there must be no set of circumstances under which the initiative may be constitutionally applied.

This Court has repeatedly stated that pre-election review of initiatives should be limited in order to avoid encroachment on the people's constitutional authority and rights and the issuance of advisory opinions. *Brown v. Carnahan*, 370 S.W.3d 637, 645 (Mo. Banc 2012). Missouri precedent thus requires that a court limit pre-election review of initiatives to "those threshold issues that affect the integrity of the election itself, and are so clear as to constitute a matter of form." *Id.* One such issue would be the

constitutionality of a proposed initiative, but such a challenge is limited to a facial review of the initiative in order to avoid the issuance of advisory opinions. *Id.* Facial invalidity is a well-defined legal term in the context of determining the validly of laws. As the term "facial invalidity" indicates, the courts do "not look behind the face of the petition to determine its constitutionality prior to its being voted on by the electorate." *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. banc 1983).

In order for a law to be facially defective it must be "so clear as to constitute a matter of form." *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 139 (Mo. banc 2000). Facial invalidity is determined from the four corners of the proposed ballot measure itself. *State ex rel. Hazelwood Yellow Ribbon Comm. v. Klos,* 35 S.W.3d 457, 468–69 (Mo. App. E.D. 2000).

The asserted constitutional violation in this case involves Article III, Section 51 of the Missouri Constitution, which states:

> The initiative shall not be used for the appropriation of money other than of new revenues created and provided for thereby, or for any other purpose prohibited by this Constitution.

A statute is unconstitutional on its face where no set of circumstances exist under which it can be applied constitutionally. *State v. Perry*, 275 S.W.3d 237, 240 (Mo. banc 2009). Therefore, in order for Ordinance No. 110607 to be declared unconstitutional, pre-election, the Ordinance must require an appropriation of money on its face and not provide for new funding.

In determining whether Missouri law limits pre-election substantive challenges to initiatives to a facial review requiring that there be no set of circumstances under which the initiative would be constitutional, we encourage this Court to adopt the reasoning espoused by the high courts of other jurisdictions, notably West Virginia.

Facial invalidity, taken literally, appears to be the majority view. That majority view includes the Supreme Court of Appeals of West Virginia's 2001 decision dealing with the same issue that is now before the Court: In what situation may a court declare an initiative petition invalid before the petition is sent to the voters? *See Burnell v. City of Morgantown*, 210 W.Va. 506 (W. Va. 2001). In *Burnell*, the city council declined to send an initiative to the voters because the council believed that the initiative conflicted with state law and the city charter. One of the asserted conflicts involved a provision of the city charter that stated that voter initiatives "shall not extend to the budget or capital program or any ordinances relating to appropriation of money, levy of taxes or salaries of City officers or employees." *Id*. at 308.

In determining the extent of pre-election judicial review, the court took great care to analyze prior West Virginia decisions, as well as decisions from other jurisdictions and notable law review articles. The court made particular note of the fact that municipal legislation, or voter initiatives, are a part of the legislative process, and that courts must take great care to avoid "judicial usurpation of the legislative process." *Id*. at 513. To achieve that end the court limited pre-election review of voter initiatives to either (1) violations of procedural or technical requirements incident to placing the measure on the

ballot, or (2) subject matter violations that go beyond the scope of the initiative power. *Id.* at 514.

Addressing possible subject matter violations, the court also needed to fashion a rule as to the extent of the substantive violation required to invalidate an initiative pre-election. It looked to the decisions of the high courts of other states for guidance. Following the majority view, the court determined that for an initiative to be withheld from the voters, it must be "defective in its entirety such that none of its provisions could, under any circumstances, have operative effect." *Id.* at 515. Thus, a court would need to find a proposed initiative was facially invalid in its entirety.

This requirement of total invalidity comports with both Missouri law and 8th Circuit precedent regarding facial challenges. *See State v. Perry*, 275 S.W.3d 237, 240 (Mo. banc 2009) ("A statute is unconstitutional on its face where it cannot be constitutionally applied in any circumstance."); *Neely v. McDaniel*, 677 F.3d 346, 350 (8th Cir. 2012), *cert. denied*, 133 S. Ct. 546, 184 L. Ed. 2d 342 (2012) (stating that to succeed on a facial challenge a party must show "no set of circumstances exist under which the Act would be valid.") This Court should limit its review of the proposed initiative to a facial review determining if any set of circumstances exist under which the initiative may be constitutionally applied.

B. Proposed Ordinance No. 110607 does not violate Article III, Section 51 of the Missouri Constitution on its face as it is not clear that no set of circumstances exist under which the initiative may be constitutionally applied.

There is nothing particularly remarkable about Ordinance No. 110607, which proposed to impose two separate sales taxes for twenty-five (25) years to help fund four separate projects that were only generally described in four sentences. Projects are described in Ordinance No. 110607 in general terms starting at one location and ending at another as: "22 mile light rail spine; "19 mile commuter rail line"; "8.5 mile street car line"; and "electric shuttle bus and bikeway feeder network." From these one-line descriptions of four separate projects the City Council concluded that the costs to construct, operate, and maintain the projects exceeded the revenues even though the Ordinance did not provide any information about the anticipated revenues, nor the scope of the projects other than the merest description of the type of project (light rail spine, street car line, commuter rail line and electric shuttle), the length of the projects, and where these projects would be constructed in the most general terms.

Two legislative findings made by the City Council in adopting Resolution 110727 to not submit the Initiative Ordinance to the voters stand out and are particularly germane to the analysis in this appeal. The City Council found in Resolution No. 110727 that: "The proposed ordinance does not provide sufficient funding to construct, operate or maintain the proposed project in the ordinance." And that: "The proposed ordinance requires the appropriation of funds beyond the new revenues created and provided by the proposed ordinance in violation of Article III, Section 51 of the Missouri Constitution."

Section 3 of the resolution further states: "That the initiative petition for a green, prosperous and transit-oriented city violates the Missouri Constitution and the Charter of Kansas City, Missouri, on its face and is therefore illegal and invalid." (Plf Exhibit 105).

There is absolutely nothing within the four corners of Ordinance No. 110607 about the costs of constructing, operating or maintaining the projects nor is there anything about the projected revenues over a twenty-five (25) year period. In order for the City Council to reach these conclusions as the basis for not submitting the Ordinance to the voters it had to go outside the face of Ordinance No. 110607; and it did so as shown by its findings and statements in Resolution No. 110727. The City Council relied on a nineteen (19) page report that was presented to the City Council from the T&I Committee, which was attached to Ordinance No. 110607 and was also referred to in Resolution No. 110727 as part of the findings of the Committee Substitute for 110727. (Plf. Exhibit 105). The City Council went outside the face of the Ordinance by relying on this report, which transforms the review from one for facial invalidity to an "as applied" challenge. As documented below, an "as applied" challenge should be reserved for a post-election review.

There have been several successful challenges (some are cited below) under Article III, Section 51 of the Missouri Constitution to local ordinances but the challenge in this case is entirely different from those cases. In the prior cases a violation of Article III, Section 51 of the Missouri Constitution was found based upon the lack of any revenue source whatsoever in the ordinance. The Ordinance language here supplies a

revenue source. This case involves a review of the *sufficiency* of the revenue source described in the ordinance.

In *State ex rel. Card v. Kaufman*, 517 S.W.2d 78, 80 (Mo. 1974) the proposed amendment to the city charter was unconstitutional in violation of Article III, Section 51 of the Missouri Constitution because it failed to create and provide new revenues to fund the additional cost to the city. In *State ex rel. Sessions v. Bartle*, 359 S.W.2d 716 (Mo. 1962) the court held that a proposed ordinance which would mandate increased salaries for certain city department members violated Article III, Section 51 of the Missouri Constitution because it made *no* provision for new revenue to defray the increased expenditures. See also *Kansas City v. McGee*, 269 S.W.2d 662 (Mo. 1954) to the same effect.

As noted above, Ordinance No. 110607 in this case is completely different from any other law or ordinance held to violate Article III, Section 51 of the Missouri Constitution as it *included* a revenue source; a sales taxes totaling 3/8 of one cent over a twenty-five (25) year period. Article III, Section 51 prohibits the appropriation of money through the use of the initiative process *other than from new revenue approved in the initiative*. The cited cases where a constitutional violation was found involved legislative actions which, on their face, would require funding from some other source. The proposed amendments and/or ordinances did not provide for a revenue source, thus they were in violation of Article III, Section 51 on their face because they would require an appropriation.

Ordinance No. 110607 provides for a substantial funding source. In order to determine if this funding source is *sufficient* to avoid requiring an appropriation, the trial court and this Court would need to resort to an "as applied analysis." *See Schools Districts' Alliance for Adequate Funding of Special Educ. v. State*, 202 P.3d 990 (Wash. Ct. App. 2009)(Analyzing the funding of special education under "facial invalidity" and "as applied" tests). An "as applied" analysis is not allowed pre-election as it is akin to an advisory opinion; facts and circumstances regarding the cost of the initiative or the amount of revenue generated could change. See *Brown*, 370 S.W.3d 637.

The power of initiative is one granted to the people. The people should not be required to craft their legislation with the same particularity and preciseness that we expect from our elected legislators. See *Burnell*, 210 W.Va. at 215. Merely because this initiative contemplates that bonds and/or federal funding *may* be required to finance the project does not render it facially invalid. A statute is unconstitutional on its face only where it cannot be applied constitutionally in any circumstance. *State v. Perry*, 275 S.W.3d 237, 240 (Mo. banc 2009). Ordinance No. 110607 before this Court provides a substantial funding source. Future circumstances may or may not come to pass that would require an appropriation from the City., Therefore Ordinance No. 110607 is not facially invalid and it was error to determine, pre-election, that the ordinance constituted an unconstitutional appropriation of money.

C. Initiative petitions are a form of legislative action and pre-election review of such measures is disfavored and should be limited.

One reason to not provide pre-election opinions is to avoid advisory opinions on whether or not a particular law *if* adopted is unconstitutional, unless the proposed measure is so obviously flawed as to constitute a matter of form. *Knight v. Carnahan*, 282 S.W.3d 9, 21-22 (Mo. App. W.D. 2009). Courts do not "sit in judgment of the wisdom or the folly of proposals." *Id.* Those who assert facial invalidity bear a heavy burden to show that the proposed ballot measure is facially defective as a matter of form. *Id.*

Facial invalidity should not be used as a guise for a pre-election challenge to a proposed ordinance because the courts have left the door open to challenges *after* the voters approve the ordinance, even if the proposed law conflicts with other laws. *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. banc. 1984). A careful reading of Ordinance No. 110607, the Report attached thereto, and Resolution No. 110727 certainly indicate that the reasons given by the City Council were a guise to avoid sending to the voters what the gatekeepers considered to be an unwise law.

Another reason for exercising caution when reviewing claims of facial invalidity is that such claims often rest on speculation. As a consequence, a challenge on facial invalidity raises the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States,* 541 U. S. 600, 609 (2004). That is particularly true in this case based on the findings of the Kansas City Council for the reasons noted above.

Nothing better illustrates this principle than *Barrett v. Claycomb*, in which the Eighth Circuit reversed and remanded a district court decision that held that the drug testing policy for all students at Linn State was facially invalid. 705 F.3d 315, 320-21 (8th Cir. 2013). The remand by the 8th Circuit was based upon the plaintiffs' inability to establish that *under all circumstances* the drug policy regulations of Linn State would be invalid. On remand the plaintiffs in *Barrett* amended their petition to bring an "as applied" challenge to the policy based on students who were enrolled in different programs, leading to a 62 page nuanced opinion on the application of the drug regulations to students enrolled in different programs offered by Linn State. *Barrett v. Claycomb*, No. 2:11-CV-04242-NKL (W.D. Mo. Sept. 13, 2013).

In addition, a "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *U.S. v. Salerno*, 481 U.S. 739, 745 (1987). To the same effect, see also *Barrett v. Claycomb*, 705 F.3d 315, 320-21 (8th Cir. 2013) and *State v. Perry*, 275 S.W.3d 237, 240 (Mo. banc 2009), both holding that a statute is only unconstitutional on its face where it cannot be applied constitutionally in any circumstance.

While there is no constitutional right to an initiative, once that right is conferred by law it is entitled to the full protection of the federal and state constitutions. *See Brown v. Carnahan*, 370 S.W.3d 637 (Mo. banc 2012). When a person or group is engaged in the initiative process, they are engaged in the exercise of their free speech rights under the United States and Missouri Constitutions. *Meyer v. Grant*, 486 U.S. 414 (1988).

Circulation of petitions is "core political speech," because it involves "interactive communication concerning political change." *Id.* at 422. First Amendment protection for such interaction is "at its zenith" under these circumstances. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999).

Plaintiffs/Appellants, were engaged in free speech activities, which included communicating to the voters their views for adoption by the voters of Ordinance No. 110607. As noted above, not only is it an enormously high hurdle to find facial invalidity of a law before the election, but extreme care needs to be exercised by the government gatekeeper (the City Council here) in denying petitioners their free speech rights to communicate their ideas to the voters unimpeded. When considering an initiative petition and whether or not the voters should be heard on the matter, the government gatekeeper should keep the following in mind:

> Nothing in our Constitution so closely models participatory democracy in its pure form. Through the initiative process, those who have no access to or influence with elected representatives may take their cause directly to the people. The people, from whom all constitutional authority is derived, have reserved the power to propose and enact or reject laws and amendments to the Constitution.

Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 827 (Mo. banc 1990).

A widely cited law review article titled *Pre-Election Judicial Review of Initiatives and Referendums* recognized the important free speech role that initiatives and referendums play even if the initiative is never enforced:

> This purpose is fulfilled even when a measure is ultimately held unenforceable after the election. An overwhelming vote on an issue may persuade legislators to consider changing the applicable constitutional provision or statute, or to enact legislation which accomplishes some of the same results sought by the ballot measure with offending constitutional or statutory restraints.

James D. Gordon III & David B. Magleby, Pre-Election Judicial Review of Initiatives and Referendums, 64 Notre Dame L. Rev. 298, 312 (1989). This article was cited previously by this Court in *Missourians to Protect the Initiative Process v. Blunt,* 799 S.W.2d 824, 833-34 (Mo. banc 1990). In addition to the free speech concerns the article notes that pre-election review of an initiative's substantive validity involves the issuance of advisory opinions, violates ripeness requirements, and constitutes a judicial intrusion into the legislative process. *Gordon,* 64 Notre Dame L. Rev. 298. Given these concerns previously recognized by this Court, we encourage this Court to continue its stance disfavoring pre-election review of the substantive provisions of initiatives and referendums.

The use of initiative petitions in our electoral process is markedly on the rise. From the number of cases involving initiative petitions this Court has been called upon to consider over the last few years, it is apparent that a brighter line test for pre-election

review of such petitions would benefit the courts, the bar, local governments and the public. Amici Curiae respectfully submit that this case presents an opportunity to give a bright line test, and to announce that if all lawful preconditions for submitting an initiative petition to the voters have been met, then the only possible pre-election legal challenge to the proposal is whether, based solely upon the language of the ballot measure as submitted, it is facially invalid. Pre-election resort to information outside the four corners of the ballot measure is inappropriate and serves to deny the proponents and the electorate of their First Amendment rights to petition their government and exercise free speech.

CONCLUSION

The trial court erred in determining that Ordinance No. 110607 was facially invalid. In a pre-election review the court was limited to a review of facial invalidity, which requires that there be no set of hypothetical circumstances under which the ordinance can be constitutionally applied in order for the proposed initiative to be declared unconstitutional. By examining matters outside the face of the initiative the court transformed the constitutional challenge into an "as applied" review, a review reserved for a post-election challenge. Under a proper narrow facial review, the proposed initiative ordinance is not facially invalid as it provides a substantial funding source for the proposed project. If Ordinance No. 110607 was facially valid, the action required is a foregone conclusion, which is to submit the Ordinance to the voters as required by law. *State ex rel. Dahl v. Lange*, 661 S.W.2d 7, 8 (Mo. banc 1983). The trial court therefore erred in its judgment and decree, and the judgment should be vacated and the cause remanded to the trial court with directions to issue a writ of mandamus directing the Respondent to bring Ordinance No. 110607 to a vote of the people at the next election, and for such other and further relief as the Court deems just and reasonable.

WHEREFORE, *Amici Curiae* pray that the Court grant them leave to file their *Amici Curiae* Brief in this matter, copies of which have been filed conditionally with the Court as required by the rules, and to grant the relief requested accordingly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that this Brief has been served on the following attorneys by electronic mail on the 30th day of September, 2013.

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COMPLIANCE WITH RULE 84.06

The undersigned hereby certifies that *Amici Curiae*'s Brief contains the information required by Rule 44.03, that the Brief complies with the limitations contained in Rule 84.06 in that *Amici Curiae's* Brief contains 4,634 words, as indicated by the word count of the word processing system used to prepare the Brief and is virus free.

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